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No. 93-86

In The

Supreme Court of the United States

October Term, 1993

OREL PARKINS,

Petitioner,

v.

MOBAY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992), which expressly prohibits the states from imposing "any requirements" for pesticide labeling or packaging "in addition to or different from those required" under FIFRA, preempts state common law failure to warn claims against pesticide manufacturers.

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MOBAY CORPORATION,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Mobay Corporation[1] respectfully requests that this Court deny Orel Parkins' petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

[1] Mobay Corporation was merged with its affiliate Miles Inc. on January 1, 1992 with Miles Inc. being the surviving corporation. However, for purposes of clarity, Respondent will be referred to as Mobay Corporation in this brief. Bayer AG is the parent corporation of Miles Inc. The following are corporations in which Miles Inc has an ownership interest but are not wholly-owned subsidiaries: Miles Sanhyo, Miles India, Sucro Miles, and H.C. Starck.

The unpublished opinion of the court of appeals is cited at 988 F.2d 1218 (11th Cir. 1993) and is reproduced in petitioner's appendix at 1a. The judgment is reproduced in petitioner's appendix at 3a.

Procedural Background

This is a wrongful death case that was removed to the Northern District of Georgia, Atlanta Division. Petitioner Orel Parkins' causes of action in this case were for negligence and strict tort liability based upon a failure to warn and label inadequacy. The product alleged to be involved, Di-Syston 8, is a pesticide that is registered with the United States Environmental Protection Agency (EPA). It is a restricted use pesticide sold only to and applied by or under direction of certified pesticide applicators. The label on the product was approved by the EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y after review of numerous toxicology, residual effect and re-entry studies.

Mobay filed a motion for summary judgment in the trial court based upon federal preemption under 7 U.S.C. § 136v(b) of FIFRA. This section reads as follows:

> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

The trial court granted the motion for summary judgment and the United States Court of Appeals for the Eleventh Circuit affirmed the judgment on March 9, 1993, finding that *Papas v. Upjohn Company*, 926 F.2d 1019 (11th Cir.

1991) was controlling. The Eleventh Circuit in the *Parkins* case also stated that there was no misbranding claim presented to the district court and therefore that issue could not be considered on appeal.

Regulatory Background

As stated, this appeal involves the effect of the preemption provision of FIFRA. Enacted in 1947 to give the Agriculture Department regulatory authority over pesticide licensing and packaging, FIFRA was transformed in 1972 into a comprehensive regulatory statute governing the use, sale, and labeling of pesticides. As part of its comprehensive regulatory scheme, Congress expressly preempted state regulation of pesticide labeling and packaging.

The Federal Government's regulation of the manufacture, marketing and use of all pesticides sold in the United States is largely executed by the EPA, pursuant to FIFRA. The cornerstone of federal pesticide regulation is FIFRA's requirement that all pesticides sold or distributed in the United States must be registered with the Administrator of the EPA. 7 U.S.C. § 136a(a).

The labeling which accompanies a pesticide is the focus of the registration process. A manufacturer must submit proposed labeling and instructions for a pesticide immediately upon application for registration. 7 U.S.C. § 136a(c)(1)(C).

The EPA Administrator undertakes a comprehensive review of all pertinent data and determines whether the data is sufficient to satisfy the requirements of FIFRA. 40

C.F.R. § 158.80(a) (1991). To register the pesticide, the EPA must find:

> (a) its composition is such as to warrant the proposed claims for it;
>
> (b) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (c) it will perform its intended function without unreasonable effects on the environment; and
>
> (d) when used in accordance with widespread and commonly-recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5). "Unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136b(bb).

The EPA requires a battery of studies, the results of which must be submitted during the application process in order to obtain registration of a pesticide. 40 C.F.R. § 158.20(b). Data submitted by the manufacturer to the EPA includes residual effect data, 40 C.F.R. § 158.240, reentry data, 40 C.F.R. § 158.390, and toxicological data, 40 C.F.R. § 158.340. Based on this and other information, the EPA classifies a pesticide in one of four toxicity categories. 40 C.F.R. § 156.10(h)(1).

Because of the crucial role that product labeling plays in the registration process, the EPA heavily regulates both the design and the content of the label. 40 C.F.R. § 156.10.

The "text" required on the front panel of the label is determined by the Toxicity Category of the pesticide. 40 C.F.R. § 156.10(h)(1). The signal words required ("Danger," "Poison," "Warning" and "Caution") depend upon the toxicity category assigned by the EPA. The EPA, not the manufacturer, determines the appropriate signal word for a given pesticide. The final printed labeling must be submitted and accepted by the Administrator before registration. 40 C.F.R. § 156.10(a)(6).

REASONS THE PETITION SHOULD BE DENIED

I. There is No Split of Authority Warranting Supreme Court Review

There is no split of authority on the preemptive effect of FIFRA among the federal circuit courts of appeal following the opinion of the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992), which is this Court's latest opinion concerning the preemptive effect of federal statutes on common law actions. The *Cipollone* case dealt with the preemptive effect of the Public Health Cigarette Smoking Act of 1969 and the Federal Cigarette Labeling and Advertising Act of 1965. Since that decision, four circuit courts have addressed the FIFRA preemption issue and found that the FIFRA preemption provision preempts all claims based upon failure to warn. These cases are as follows: *Papas v. The Upjohn Company*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); and *King v. E.I. DuPont*

de Nemours & Co., No. 92-2381, 1993 WL 232939 (1st Cir., July 7, 1993).

In addition, only one state court of last resort, the Nevada Supreme Court in the *Davidson* case, has addressed this issue since *Cipollone*, and it also found that FIFRA preempts common law failure to warn claims. In the *Davidson* case, the United States Supreme Court has denied the petition for writ of certiorari. *Davidson v. Velsicol Chemical Corp.*, 834 F.2d 931 (Nev. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1944 (1993).

II. The Opinion of the Eleventh Circuit Finding Preemption was Correct

A. Federal Preemption Standard

Federal preemption of state law is based on the Supremacy Clause of the United States Constitution. The Supremacy Clause provides that "the Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. IV, cl. 2. The Supreme Court has repeatedly explained the principles which govern a claim of federal preemption:

> Federal law may preempt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. E.g., *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96, 103 S. Ct. 2890, 2898-99, 77 L.Ed.2d 490 (1983). Second, even in the absence of express preemptive

> language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. E.g., *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed.2d 581 (1941). *See also Fidelity Federal Sav. & Loan Ass'n, supra*, 458 U.S. at 153, 102 S. Ct. at 3022.

Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board, 467 U.S. 461, 469 (1984); *accord Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 203-04 (1983).

B. *Cipollone* Mandates a Finding of Express Preemption

1. Pre-*Cipollone* Cases

While the vast majority of courts to consider the issue since FIFRA was amended in 1972 have held that FIFRA preempted state common law claims based upon

failure to warn, they were divided over whether such FIFRA preemption was express or implied.[2] A small minority of courts also clung to the view that FIFRA did not preempt such claims.[3]

2. Analysis of *Cipollone*

The United States Supreme Court recently considered the scope of federal preemption of state tort claims by the cigarette advertising and labeling requirements in the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"), and found that such expressly preempts state common law claims based on failure to warn. *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992). The foundation of the Supreme Court's finding of express preemption is contained in § 5(b) of the 1969 Act, which

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[2] *See, e.g. Papas I, supra; Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[3] *See, e.g. Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984). *Ferebee*, the only U.S. Court of Appeals decision ever to find that FIFRA did not preempt common law failure to warn claims, is nearly a decade old, was never widely followed and now, after *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), discussed *infra*, thoroughly discredited. *See generally Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1139-1141 (E.D.N.Y. 1992) (Weinstein, J.) (Ferebee's notion of a manufacturer's "choice" among paying damages in state tort actions, changing the label, and not selling the product in the state is "artificial"; *Ferebee's* distinction between regulatory and tort law does not survive *Cipollone*.) *See also Stamps v. Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3870 (U.S. June 16, 1993) (No. 92-1989) (observing that analysis in *Ferebee* does not survive *Cipollone*).

is very similar to the preemption provision contained in FIFRA:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

112 S. Ct. at 2617. The Supreme Court compared the preemption provision in the 1969 Act with its predecessors' preemption provision, § 5(b) of the Federal Cigarette Labeling & Advertising Act, enacted in 1965 ("the 1965 Act"). The 1965 Act's preemption provision states:

> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act.

112 S. Ct. at 2616.

The Court found that the language in the 1969 Act is much broader than the language in the 1965 Act. 112 S. Ct. at 2619. "First, the latter act [the 1969 Act] bars not simply 'statements' but rather 'requirement[s] or prohibition[s] . . . imposed under State law.' " 112 S. Ct. at 2619. The Court further reasoned that the phrase " '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." 112 S. Ct. at 2620.

The primary distinction drawn between the 1965 and 1969 Acts in *Cipollone* is that the 1965 Act "merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels . . . or in cigarette advertising" and, thus, only prohibited positive enactments. 112 S. Ct. at 2618-19. On the other hand, the 1969 Act prohibits not just "statements" but also "requirements and prohibitions." 112 S. Ct. at 2619. The latter includes positive enactments as well as common law actions. 112 S. Ct. at 2620.

So too, the wording of FIFRA's preemption provision encompasses not just positive enactments but also common law actions. Like the 1969 Act, § 136v(b) uses the term "requirements." In this case, petitioner's failure to adequately warn claims are based on alleged label deficiencies, which suggest that the EPA-approved label inadequately warns users of the hazards of the product. This type of common law claim necessarily includes a jury finding that the EPA-approved label is insufficient because it does not contain certain additional information or warnings. A damages award based on such a jury finding would effectively impose "requirements" on the manufacturer that are different from those imposed by FIFRA. It cannot be argued but that a State is prohibited from imposing such requirements. It logically follows that a jury determination with the same effect is also forbidden by FIFRA. Since petitioner's negligence and strict liability claims for failure to warn, as pled, impose "requirements" in addition to or different from those required by FIFRA, those claims are expressly preempted.

3. A Jury Verdict is Equivalent to State Regulation

The Supreme Court has consistently acknowledged the regulatory impact of common law tort actions. In *Cipollone*, the Court stated: " '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' " 112 S. Ct. at 2620, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

In *Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1980), plaintiff, a brick manufacturer, brought a lawsuit in Iowa state court against defendant, a railroad. Plaintiff sought damages under Iowa statutory and common law for defendant's allegedly wrongful abandonment of the rail line which served plaintiff's factory. However, defendant had sought and received the permission of the Interstate Commerce Commission to abandon the line. The Iowa Court of Appeals held that plaintiff's suit was not preempted by the Interstate Commerce Act. The United States Supreme Court unanimously reversed.

The Court first held that the Interstate Commerce Act provides the ICC with exclusive power to allow or disallow a railroad to abandon a line. 450 U.S. at 320. It then held that Iowa law, as manifested through plaintiff's suit, was in conflict with the federal law. The Court explained that it would be clearly inconsistent with Congressional intent to allow a state "to use the threat of damages to require a carrier to do exactly what the Commission is

empowered to excuse." 450 U.S. at 326. Thus, the Court understood that the specter of civil damages is clearly a means by which the state may seek to impose its regulatory wishes. *See also International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (nuisance suit seeking damages and injunction against water polluter preempted by Clean Water Act); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (suit for damages based on California common law doctrine restricting enforcement of "due on sale" clauses in home mortgage loans preempted by federal regulation allowing enforcement of such a clause).

4. Cases Decided After *Cipollone*

As stated previously, every federal circuit opinion decided after *Cipollone* has found that FIFRA preempts failure to warn actions. In *Papas I*, the Eleventh Circuit found that FIFRA impliedly preempts state common law actions based on inadequate labeling allegations. The Tenth Circuit found likewise in *Arkansas-Platte & Gulf Partnership v. Van Waters and Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992) ("*Arkansas-Platte I*"). After its decision in *Cipollone*, the Supreme Court vacated and remanded both *Papas I* and *Arkansas-Platte I*, "for further consideration in light of *Cipollone*." *Papas v. Zoecon Corp.*, ___ U.S. ___, 112 S. Ct. 3020 (1992) and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, ___ U.S. ___, 113 S. Ct. 314 (1992). Following remand, the Eleventh and Tenth Circuits found that FIFRA expressly preempts state common law failure to warn claims. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) ("*Papas II*") and *Arkansas-Platte & Gulf*

Partnership v. Van Waters and Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993) ("*Arkansas-Platte II*").

In *Papas II*, the Eleventh Circuit concluded that "the *Cipollone* opinion dictates, under an express preemption analysis, the same result we reached earlier under the implied preemption doctrine." *Papas II*, 985 F.2d at 518. The court further stated:

> The Papases concede that each of their negligence, strict liability, and breach of implied warranty counts alleges in part that Zoecon failed to warn users that its products contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures. Those allegations, like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids. . . . Thus, to the extent the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated warnings, those claims are preempted."

Id., citing *Cipollone*, 112 S. Ct. at 2621-22.

The Tenth Circuit similarly concluded that "to the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Arkansas Platte II*, 981 F.2d at 1179. "Indeed, our conclusion is reinforced because the labeling provision of § 136v(b) is as inclusive as that

contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b), which the Court held constituted a preemption of state common law labeling and duty to warn claims." *Id.* at 1179, citing *Cipollone*, 112 S. Ct. at 2621-22.

The First and Seventh Circuits have joined the Tenth and Eleventh Circuits in holding that FIFRA expressly preempts state law failure to warn claims. *King v. E. I. DuPont de Nemours & Co.*, No. 92-2381, 1993 WL 232939 (1st Cir. July 7, 1993) and *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993). Like the courts in *Papas II* and *Arkansas Platte II*, the *King* and *Shaw* courts concluded that its analysis of FIFRA preemption was controlled by *Cipollone*. As stated in the *Shaw* case, "If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA." *Shaw*, 994 F.2d at 371.

At least eleven other cases have been decided since the *Cipollone* decision as follows: *Kolich v. Sysco Corp.*, 1993 WL 249093 (D. Kan. June 8, 1993); *Casper v. E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903 (E.D. Wash. 1992); *Gibson v. Dow Chemical Co.*, No. 92-30 (E.D. Ky. Oct. 19, 1992); *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992); *Burke v. Dow Chemical Co.*, 759 F. Supp. 1128 (E.D.N.Y. 1992); *MacDonald v. Monsanto Co.*, No. 1:91CV162, 1993 WL 49898 (E.D. Tex. Feb. 25, 1993); *Burge v. Jones*, No. B-92-022, 1992 WL 415263 (S.D. Tx. Nov. 18, 1992); *Davidson v. Velsicol Chemical Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1944 (1993); *Brennan v. Dow Chemical Co.*, 613 So.2d 131 (Fla. Dist. Ct. App. 1993); and *Yowell v. Chevron Chemical Co.*, 836 S.W.2d 62 (Mo. Ct. App. 1992). The courts in nine of

the eleven cases hold that FIFRA preempts state common law failure to warn claims. The courts in *Kolich, Casper, Gibson, Burge, Davidson, Brennan* and *Yowell* held that the defendant pesticide manufacturers were entitled to summary judgment. Although the court in *Burke* declined to grant summary judgment, it did acknowledge that "[u]nder the preceding express preemption analysis, however, defendants are entitled to some preemption protection, the precise extent of which need not be determined before completion of discovery." *Burke*, 797 F. Supp. at 1141. Only *Couture* and *MacDonald* held that FIFRA neither expressly nor impliedly preempts failure to warn claim, and *MacDonald* has been appealed to the Fifth Circuit, which has already stated that the *Ferebee* case's rationale did not survive *Cipollone*. *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3837 (U.S. June 16, 1993) (No. 92-1989).

CONCLUSION

This Court's decision in *Cipollone* dictates the federal preemption analysis for failure to warn claims. The courts have had little difficulty in applying the law set out in that opinion to find that FIFRA likewise preempts failure to warn actions, such as those involved in this case. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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